# UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION 3:14-cv-667-FDW

FRANK DURAND TOMLIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	ORDER
JOHN DOE, Doctor,	)	
Lanesboro Correctional	)	
Institution,	)	
	)	
<b>Defendants.</b>	)	
	)	

**THIS MATTER** is before the Court on an initial review of Plaintiff's pro se complaint that was filed pursuant to 42 U.S.C. § 1983, and Plaintiff's application to proceed *in forma* pauperis. <sup>1</sup>

## I. BACKGROUND

Plaintiff is a prisoner of the State of North Carolina who is presently housed in the Lanesboro Correctional Institution. In his complaint, Plaintiff alleges that an unnamed doctor within Lanesboro Correctional violated his Eighth Amendment right to be free from cruel and unusual punishment by being deliberately indifferent to his serious medical needs. In sum, Plaintiff contends that the doctor has declined to evaluate him and failed to provide treatment to treat his frequent vomiting and that he has been unable to eat.

### II. STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 1915(A)(a), "The court shall review . . . a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a

<sup>&</sup>lt;sup>1</sup> The Court has examined Plaintiff's affidavit and finds that he does not have sufficient funds from which to prepay the costs of this civil action. Plaintiff's motion to proceed *in forma pauperis* will therefore be allowed.

governmental entity." Following this initial review the "court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted." <u>Id.</u> § 1915A(b)(1). In conducting this review, the Court must determine whether the complaint raises an indisputably meritless legal theory or is founded upon clearly baseless factual contentions, such as fantastic or delusional scenarios. <u>Neitzke v. Williams</u>, 490 U.S. 319, 327-28 (1989).

A pro se complaint must be construed liberally. <u>Haines v. Kerner</u>, 404 U.S. 519, 520 (1972). However, the liberal construction requirement will not permit a district court to ignore a clear failure to allege facts in the complaint which set forth a claim that is cognizable under Federal law. Weller v. Dep't of Soc. Servs., 901 F.2d 387, 391 (4th Cir. 1990).

#### III. DISCUSSION

Plaintiff is a prisoner of the State of North Carolina and was so at the time that he filed his complaint. Accordingly, Plaintiff must abide by the mandatory requirements of the Prisoner Litigation Reform Act ("PLRA") which provides that a prisoner must exhaust his administrative remedies <u>prior</u> to the commencement of a civil action under § 1983. The PLRA provides, in pertinent part that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

In <u>Porter v. Nussle</u>, 534 U.S. 516 (2002), the Supreme Court held that the PLRA's exhaustion requirement applies to all inmate suits about prison life and the Court noted that "exhaustion in cases covered by § 1997e(a) is now mandatory." <u>Id.</u> at 524 (citing <u>Booth v. Churner</u>, 532 U.S. 731, 739 (2001)). The <u>Porter Court went on to stress that the exhaustion requirement must be met before commencement of the suit. <u>Id.</u> Whether an inmate has properly</u>

exhausted his administrative remedies is a matter to be determined by referencing the law of the state where the prisoner is housed and where the allegations supporting the complaint arose. See Jones v. Bock, 549 U.S. 199, 218 (2007) ("The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion.").

The Fourth Circuit has determined that the PLRA does not require that an inmate allege or demonstrate that he has exhausted his administrative remedies. <u>Anderson v. XYZ Corr. Health Servs.</u>, 407 F.3d 674 (4th Cir. 2005). Indeed, failure to exhaust administrative remedies is an affirmative defense, but the Court is not prohibited from sua sponte examining the issue of exhaustion in reviewing the complaint. As the Fourth Circuit observed:

[A]n inmate's failure to exhaust administrative remedies is an affirmative defense to be pleaded and proven by the defendant. That exhaustion is an affirmative defense, however, does not preclude the district court from dismissing a complaint where the failure to exhaust is apparent from the face of the complaint, nor does it preclude the district court from inquiring on its own motion into whether the inmate exhausted all administrative remedies.

## Anderson, 407 F.3d at 683.

In North Carolina, State prisoners must complete a three-step administrative remedy procedure (ARP) in order to exhaust their administrative remedies. <u>See</u> N.C. Gen. Stat. §§ 148-118.1 to 148-118.9 (Article 11A: Corrections Administrative Remedy Procedure); <u>Moore v.</u> Bennette, 517 F.3d 717, 721 (4th Cir. 2008).

In Plaintiff's complaint, he plainly admits that he has not exhausted his administrative remedies. (3:14-cv-667, Doc. No. 1 at 2). Plaintiff states that he filed a Step One grievance but indicates that he did not appeal from the Step One response because he is in an emergency situation. However, Plaintiff does not claim that he can receive no medical treatment; rather he

complains that an unnamed doctor is refusing to treat him. This fact, if true, does not excuse Plaintiff from the mandatory exhaustion requirements of the PLRA.

Based on the foregoing review of the record, it appears from the face of the complaint that Plaintiff has failed to exhaust his administrative remedies prior to filing his § 1983 complaint.

Accordingly, this civil action will be dismissed without prejudice.

## IV. CONCLUSION

**IT IS, THEREFORE, ORDERED** that that Plaintiff's application to proceed *in forma* pauperis is **GRANTED**. (Doc. No. 2).

IT IS FURTHER ORDERED that Plaintiff's complaint is **DISMISSED** without prejudice. (Doc. No. 1).

The Clerk of Court is directed to close this civil case.

IT IS SO ORDERED.

Signed: December 3, 2014

Frank D. Whitney

Chief United States District Judge